PREMIUM VEGETABLE OILS SDN BHD v. THE OWNERS AND/OR DEMISE CHARTERERS OF THE SHIP OR VESSEL "EVER CONCORD" (IMO NO. 9033347) OF THE PORT OF ZANZIBAR, TANZANIA

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD JC
[ADMIRALTY IN REM NO: WA-27NCC-7-01-2020]
21 SEPTEMBER 2020

SHIPPING: *Action in rem – Warrant of arrest – Full and frank disclosure – Requirement – Mouldy cargo – Allegations that cargo contaminated by seawater – Vessel arrested – Whether vessel fully responsible for damages arising from contamination of cargo during voyage – Whether there was any requirement for full and frank disclosure on arresting party when requesting for issuance of warrant of arrest – Rules of Court 2012, O. 18 r. 19(1)(b) & (d)*

CIVIL PROCEDURE: *Setting aside – Application for – Application to set aside writ in rem and warrant of arrest – Allegations that cargo contaminated by seawater – Vessel arrested – Whether vessel fully responsible for damages arising from contamination of cargo during voyage – Whether there was any requirement for full and frank disclosure on arresting party when requesting for issuance of warrant of arrest – Rules of Court 2012, O. 18 r. 19(1)(b) & (d)*

The plaintiff entered into a contract with PT Agro Indomas ('PTAI') to purchase a cargo of approximately 2000 metric tons (+/- 5%) of palm kernel to be shipped to Malaysia. PTAI chartered the vessel owned by the defendant for the carriage of the palm oil kernel from Indonesia to Malaysia. The vessel arrived at Indonesia and berthed and commenced loading of the cargo from PT Agro Indomas. Pursuant to a second sales contract, the plaintiff purchased from PT Agro Asia Pacific ('PTAAP') 200 metric tons of palm kernel (+/-2%) where the cargo was also to be shipped to Malaysia. The loading was completed and the defendant's agent, Gama Bistari Sdn Bhd ('GB') issued two bills of lading. The vessel commenced its voyage from Indonesia to Malaysia and arrived at the discharged port *ie* Pasir Gudang, Malaysia. However, upon arrival at the discharge port, the plaintiff discovered that the top surface of the cargo was mouldy. The plaintiff and GB appointed surveyors to carry out joint survey and sampling on the cargo. PTAI and PTAAP issued the letter of protest to GC *ie* GB to inform that the cargo had been contaminated by seawater and the shippers held GB/the vessel fully responsible for the damages arising from the contamination of the cargo. Following an inspection by the surveyors, GB issued a note of protest to PTAI to inform on the circumstances causing the delay in the discharging

operation and to reserve their rights to claim against the voyage charterer for the loss/demurrage incurred and any consequential losses that may arise due to the delay. The plaintiff instructed the discharge of the cargo and, following report that there were traces of chloride, commenced an action *in rem* against the defendant for loss of and/or damage to the cargo during the voyage, pursuant to the bills of lading by reason of the defendant's negligence and/or breach of duty and/or breach of contracts in the carriage. The vessel was arrested by the plaintiff at Pasir Gudang. In the present application ('encl. 21'), the defendant sought: (i) the setting aside of the writ *in rem* and warrant of arrest pursuant to O. 18 r. 19(1)(b) and (d) of the Rules of Court 2012 ('ROC'); (ii) an order for the immediate release of the vessel; (iii) costs incurred for the release of the vessel to be borne by the plaintiff; and (iv) damages. The issue that arose for adjudication was whether there was any requirement of full and frank disclosure on the plaintiff when requesting for the issuance of the warrant of arrest.

Held (dismissing encl. 21):

(1) No arguments on setting aside or striking off the writ *in rem*, pursuant to O. 18 r. 19(1)(b) and (d), was put forward by the defendant. The submissions focused on the setting aside of the warrant of arrest for failure to provide full and frank disclosure. The contentions of the defendants did not merit the setting aside of the writ and warrant of arrest. The warrant of arrest was properly issued and the defendant failed to establish that the claim of the plaintiff was either legally or factually unsustainable. (paras 21, 47 & 48)

(2) The plaintiff had satisfied that the requirements under O. 70 r. 4(6) and (7) of the ROC had been complied with, without any further requirement of full and frank disclosure in its request for the issuance of the warrant of arrest. The issue of a warrant of arrest is not a discretionary remedy but a right for the plaintiff. There is no requirement of full and frank disclosure and the arresting party only has to demonstrate that he has complied with O. 70 r. 4 of the ROC. In any event, there was no non-disclosure of material facts in the plaintiff's arrest affidavit to justify the setting aside of the warrant of arrest. (paras 31, 32 & 45)

(3) The cargo was not off-specification at load port although the moisture and impurities contents of the cargo, as indicated in the certificates of analysis, exceeded the specification provided in the sales contracts as these were within the allowance given for cargo moisture content and impurities content. The bills of lading stated 'Shipped on board in apparent good order and condition, weight, measure, marks and

numbers, quality, contents and value unknown for carriage to the port of discharge'. No notation nor any clausing was apparent on the bills of lading. If the cargo was mouldy, there would be a notation on the bills of lading to that effect. The statement by the master was an admission that the cargo was received by the vessel in good order and condition. (para 46)

Case(s) referred to:

Castle Inn Sdn Bhd v. Bumiputra-Commerce Bank Bhd [2009] 2 CLJ 445 CA ***(not foll)***
Probase Offshore (M) Sdn Bhd v. Pemunya Kapal Dan Sesiapa Berkenaan Dengan Kapal atau Vessel "Permata Arau 1" [2017] 1 LNS 1857 HC ***(refd)***
Shivnath Rai Harnarain (India) Ltd v. The Owners of the Ship or Vessel MV 'Win Moony' [2004] 1 LNS 444 HC ***(not foll)***
Silver v. Ocean Steamship Company, Limited [1928. S. 871] [1930] 1 KB 416 ***(refd)***
Thaumas Marine Ltd v. Owners And/Or Other Persons Having Interest In The Ship/Vessel "JHW Sapphire" (Official No: 334161/IMO No: 9541083) Registered In Port Klang, Malaysia [2017] 1 LNS 2061 HC ***(refd)***
The Bunga Melati 5 [2012] 4 SLR 546 ***(refd)***
The "Eagle Prestige" [2010] 3 SLR 294 ***(refd)***
The Varna [1993] 2 Lloyd's Rep 253 ***(refd)***
The Vasso [1984] 1 Lloyds Report 235 ***(refd)***
Vasiliy Golovnin [2008] 4 SLR(R) 994 ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 18 r. 19(1)(b), (d), O. 70 r. 4(1), (2), (6)(a), (b), (c), (d), (7)(a), (b), (c), (11)
Rules of the High Court 1980, O. 70 r. 4(2)

Rules of Court [Sing], O. 70 r. 4
Rules of the Supreme Court 1965 [UK], O. 75 r. 5(1)

Other source(s) referred to:

Lexis Nexis Malaysian Court Practice, para 70.4.12, p 1462
Malaysian Civil Procedure, vol 1, 2018 edn, Sweet & Maxwell, p 936, para 70/4/7
Nigel Meeson, *Admiralty Jurisdiction and Practice,* 1993 edn, p 121
Toh Kian Sing SC, *Admiralty Law and Practice,* 2017, 3rd edn, pp 190-191

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Reported by Najib Tamby

JUDGMENT

Atan Mustaffa Yussof Ahmad JC:

Introduction

[1] This judgment concerns the defendant's application (encl. 21) for *inter alia*, the following:

(i) That the writ *in rem* dated 20 January 2020 ("the writ") and warrant of arrest dated 20 January 2020 ("the warrant of arrest") are set aside pursuant to O. 18 r. 19(1)(b) and (d) Rules of Court 2012 ("ROC");

(ii) An order for the immediate release of the vessel "EVER CONCORD" (IMO No.: 9033347) from the Port of Zanzibar ("the vessel");

(iii) All costs incurred for the release of the vessel to be borne by the plaintiff; and

(iv) Damages including demurrage and detention charges to be assessed and paid by the plaintiff to the defendant.

[2] After examining the affidavits and considering both submissions filed and oral submissions of counsels, I dismissed encl. 21 and ordered costs of RM6,000 against the defendant. This judgment contains the full grounds for my decision.

Brief Facts

[3] Pursuant to a sales contract no. SA02XI12-10855 dated 21 November 2019 ("sales contract 1"), the plaintiff as buyers contracted with PT Agro Indomas as sellers to purchase a cargo of approximately 2000 metric tons (+/- 5%) of RSPO mass balance palm kernel in bulk on CIF basis to be shipped to Pasir Gudang, Malaysia.

[4] The vessel, owned by the defendant, was chartered through its agent, Gama Bistari Sdn Bhd ("Gama Bistari") on or about 28 November 2019 by PT Agro Indomas for the carriage of the palm oil kernel from Sampit, Indonesia to Pasir Gudang, Johor *via* fixture note no. 004/GBSB- PTAGIN/11/2019 dated 28 November 2019.

[5] The vessel arrived at Sampit Indonesia on 6 December 2019. The vessel berthed and commenced loading of the cargo on 1 December 2019 from PT Agro Indomas.

[6] Further, pursuant to a second sales contract no. SD02XII12-00032 dated 18 December 2019 ("sales contract 2"), the plaintiff as buyers had contracted with PT Agro Asia Pacific as sellers to purchase approximately 200 metric tons of Palm Kernel in Bulk (+/- 2%) on CIF basis where the said cargo is also to be shipped to Pasir Gudang, Malaysia.

[7] The loading was completed on 27 December 2019 and the defendant's agent, Gama Bistari issued two bills of lading both dated 27 December 2019:

(i) Bill of lading no. SMQ/PGU-01 to PT Agro Indomas for 1881.140MT of RSPO mass balance palm kernel in bulk; and

(ii) Bill of lading no. SMQ/PGU-02 to PT Agro Asia Pacific for 119.510MT palm kernel in bulk.

All cargo in the two bills of lading are be collectively referred to as "the cargo" and the two bills of lading are be collectively referred to as "the bills of lading."

[8] The vessel commenced its voyage from Sampit, Indonesia to Pasir Gudang, Malaysia on 7 January 2020 and arrived at the discharge port ie, Pasir Gudang, Malaysia on 13 January 2020.

[9] Upon arrival of the vessel at the discharge port and upon opening hatch cover number two of the vessel for commencement of cargo discharge operation, according to the plaintiff, it was discovered that the top surface of the cargo in hatch number two appeared white where the cargo is believed to be mouldy.

[10] Discharging operation commenced at 1400 hours on 16 January 2020 but the discharging operation was interrupted for the plaintiff's surveyor, ITS Testing Services (M) Sdn Bhd ("Intertek") and Gama Bistari's appointed surveyor ie, Maphilindo Insight Sdn Bhd ("Maphilindo") to carry out joint survey and sampling on the cargo.

[11] On 17 January 2020, both shippers named in the bills of lading ie, PT Agro Indomas and PT Agro Asia Pacific issued their respective letters of protest to the defendant's agent ie, Gama Bistari to inform that the cargo has been contaminated by sea water and the shippers hold Gama Bistari/the vessel fully responsible for the damages arising from the contamination of the cargo.

[12] On 18 January 2020, a joint inspection was conducted by the representative of the plaintiff (Intertek), the representative of the defendant (Maphilindo) and the insurer.

[13] On 19 January 2020 Gama Bistari issued a note of protest to PT Agro Indomas to inform on the circumstances causing the delay in the discharging operation and to reserve their rights to claim against the voyage charterer for the loss/demurrage incurred and any consequential losses that may arise due to the delay.

[14] On 20 January 2020, the plaintiff instructed the discharge of the cargo. A report by Intertek on the analysis of samples stating that there are traces of chloride was also produced on this day.

[15] Also on 20 January 2020 the plaintiff commenced an action *in rem* against the vessel. The plaintiff's case against the defendant is for loss of and/or damage to the cargo during the voyage from Sampit, Indonesia to Pasir Gudang, Malaysia pursuant to the bills of lading sustained by reason of the defendant's negligence and/or breach of duty and/or breach of contracts in the carriage thereof, together with interest and costs.

[16] The vessel was arrested by the plaintiff at Pasir Gudang, Johor on 22 January 2020.

[17] Also on 22 January 2020 Maphilindo produced a preliminary report after the investigation into the nature, cause and extent of damage to the cargo. Intertek produced reports on the analysis of samples of the cargo on 22 January 2020 and 24 January 2020.

[18] In January 2020, certificates of analysis were produced by Sucofindo, the shipper's appointed surveyor, at the load port where the moisture content of the cargo under sales contract 1 and the cargo of palm kernel under sales contract 2 were indicated as 8.78% and 7.70% respectively whereas the impurities (dirt and shell) of the cargo were indicated as 4.96% and 7.71% respectively.

[19] On 20 February 2020, the defendant filed encl. 21.

Defendant's Submissions

[20] The crux of the defendant's submission for the defendant's application in encl. 21 is that the plaintiff had failed to make full and frank disclosure in its affidavit leading to the warrant of arrest ("the arrest affidavit") where according to the defendant, the plaintiff had failed to disclose material facts and misrepresented and suppressed material facts in order to obtain the *ex parte* warrant of arrest from the court. In particular, the defendant contended as follows:

(i) There is no evidence of seawater contaminating the cargo in the vessel. The plaintiff's averment in the arrest affidavit that the findings of Intertek, the plaintiff's surveyor dated 20 January 2020 does not support the claim of "contamination of cargo by seawater" as the phone screenshot exhibited makes no reference to "seawater" or that the cargo is contaminated. The term "chloride" in the finding only refers to "salt" rather than "seawater".

(ii) The letters of protest dated 17 January 2018 from the sellers in Indonesia, PT Agro Indomas and PT Agro Asia Pacific (encl. 7 pp. 70 and 71) to claim that the cargo was contaminated by seawater does not lend any support to the plaintiff's contention as the sellers, at the material time were in Indonesia and the joint inspection of the cargo was only carried out on 18 January 2020, a day after the letters of protest were issued by the sellers.

(iii) The plaintiff failed to disclose information known to the plaintiff that the cargo which was delivered and loaded into the vessel had a higher moisture and dirt and shell content ie, off-specification and contaminated. The plaintiff only set out the purchase details with the sellers and the specification of the cargo but the report of the seller's surveyor (Sucofindo) by way of certificates of analysis (encl. 26 pp. 46 and 47), the cargo from the sellers delivered at Sampit, Indonesia had a higher moisture and dirt and shell content.

(iv) The plaintiff misled the court in the arrest affidavit that the surveyor, Sucofindo, was the appointed surveyor of the defendant's agent, Gama Bistari when actually Sucofindo is the seller's appointed surveyor and not the defendant's.

(v) Sucofindo had inspected the hatch before the loading of the cargo and certified, amongst others that the hatch was fit to receive the cargo (encl. 7, pp. 60 to 69).

(vi) The plaintiff did not state in its affidavit with regards any settlement from the insurer, being a CIF contract, which is required under O. 70 r. 4(6)(b) ROC until the defendant filed this application.

[21] It is observed that no arguments on setting aside or striking off the writ *in rem* pursuant to O. 18 r. 19(1)(b), (d) and (d) ROC was put forward by the defendant and the submissions only focused on the setting aside of the warrant of arrest for failure to provide full and frank disclosure.

Plaintiff's Submissions

[22] The main thrust of the plaintiff's submission is that all material facts were disclosed in the arrest affidavit and the plaintiff did not breach the affidavit requirements for obtaining a warrant of arrest as envisaged under O. 70 r. 4 of the ROC. In response to the defendant's submissions, the plaintiff contended that:

(i) There is cogent evidence to support the plaintiff's case of seawater contamination, which at this stage would only need to be substantiated to the standard of a triable issue. There is evidence that the cargo from the point of shipment to the point of delivery, whilst in the custody of

the defendant, experienced deterioration by high increases of moisture content, shell and dirt content, FFA (as lauric) content and positive high to positive traces of contamination by seawater in the cargo as shown in Intertek's reports dated 22 January 2020 and 24 January 2020 which was as a result of laboratory tests (encl. 26 pp. 60 and 61).

(ii) Pictures attached to Intertek's survey report dated 20 January 2020 clearly show that mouldy cargo was sighted during discharge operations and there was presence of oily water at the hatch floor within the cargo hold which suggests ingress of water (whether seawater or otherwise) (encl. 7 pp. 69(a) to 69(j)).

(iii) The cargo was not "off-specification" at load port although the moisture and impurities contents of the cargo as indicated in the certificates of analysis exceed the specification provided in the sales contracts. There is an allowance given in the sales contracts for cargo moisture content as well as impurities (dirt and shell) content. Cargo moisture content can be within the range of 7% and 10% while for impurities content the range is between 6% to 10%. The price of the cargo will be adjusted downward according to the discrepancy and only rejected if the cargo's moisture and impurities content fall outside the range which was not the case here and the cargo was on-spec. What is relevant is the evidence shows that the cargo deteriorated whilst in the custody of the defendant.

(iv) The plaintiff accidentally misstated in the arrest affidavit that Sucofindo was the appointed surveyor for the defendant's agent, Gama Bistari and did not act on bad faith to intentionally mislead the court. At the first available opportunity, the plaintiff rectified its mistake and stated in the statement of claim that Maphilindo is Gama Bistari's appointed surveyor.

(v) What is relevant is not the party represented by Sucofindo but the contents of the documents issued by Sucofindo ie, the survey reports issued at load port for the cargo, the certificates of weight, the certificates of hatch cleanliness and the certificates of analysis. The contents of the documents issued by Sucofindo (encl. 7, pp. 60 to 69) show that the cargo deteriorated whilst in the custody of the defendant during the time of shipment as compared to the state of the cargo at the time of delivery.

(vi) There had not been any settlement by the insurer or any third party with regard to the cargo damage in question. This is not a relevant consideration as this fact is only material if the plaintiff had received compensation from either the insurer or third party for the same cargo damage and in such an event, the plaintiff would be duty-bound to disclose such fact prior to the granting of the warrant of arrest, which is not the case here.

A **Further Submissions On The Requirement Of Full And Frank Disclosure**

[23] In the written submissions filed, although the plaintiff and the defendant submitted on whether all material facts were disclosed in the arrest affidavit, there were no submissions on whether there is any requirement of full and frank disclosure on the plaintiff in the first place when requesting for the issuance of the warrant of arrest. I felt that submissions on this point were necessary as in Sweet & Maxwell, *Malaysian Civil Procedure* (vol. 1) (Malaysia edn, 2018) at para. 70/4/7 the author's view was that there is no any requirement of full and frank disclosure. The full text appears as below:

> [70/4/7] False or inaccurate statement in affidavit – *if the requirements under r. 4(6) and (7) are complied with then there is no further scope for the application of any duty of full and frank disclosure.* The non-disclosure of the fact that there had been negotiations, that there were attempts to mitigate the damage, are not material to the issue of a warrant of arrest (see *Owners of the Cargo Carried in the Ship "Santorini 1" v. Owners of the Ship and Other Persons Interested in the Ship "Santorini 1"* [1194] 3 AMR 2456; *The Varna* [1993] 2 Lloyd's Rep 253, CA (Eng)). Order 70 r. 4 now appears to contain similar language to RSC 1965 (revoked) Order 75 r. 5. This was the same position in England: see *The Vasso* [1984] QB 477; [1984] 1 Lloyd's Rep 235, CA (Eng). The 1986 amendments to the English RSC 1965 amended RSC Order 75 r. 5 whereby the issue of a warrant of arrest is not a discretionary remedy, but a right for the Plaintiff. *Since the amendment to RSC Order 75 r. 5, the full and frank disclosure requirement is now gone. The arresting party only has to demonstrate that he has complied with RSC 1965 Order 75 r. 5:* see *The Varna (above) (approved and applied in Haji-loannou v. Frangos* [1999] 2 Lloyd's Rep 337, CA (Eng)). The present English position is rightly summarised by Nigel Meeson in his book *Admiralty Jurisdiction and Practice* (1993 edn), p 121: "… the duty of disclosure in relation to an application for arrest is not as extensive as it is in relation to an application for *Mareva* injunction or *Anton Piller* order … although in form discretionary, in practice arrest is granted as of right where the provisions of Order 75 r. 5, have been followed." (emphasis added)

[24] Further, it was opined by the learned author, Toh Kian Sing SC, in his book *Admiralty Law and Practice* (2017, 3rd edn) at pp. 190 to 191 that while in Singapore there is a requirement for full and frank disclosure in an affidavit filed in support of the application of the warrant of arrest, the Malaysian position is similar to the English position as arrived at in *The Varna* [1993] 2 Lloyd's Rep 253 (English Court of Appeal) decided in light of the amended O. 75 r. 5 of the English Rules of the Supreme Court 1965 ("RSC") which bears similar words to the Malaysian O. 70 r. 4(1) ROC. This is what the learned author has to say:

> Until the decision of *The Rainbow Spring*, it was not entirely certain if there is a requirement under Singapore law for there to be full and frank disclosure in the affidavit to be filed in support of the application for the warrant of arrest. The position under English law is that there is no such duty because a party is entitled to arrest a vessel as of right. The English court has no discretion to refuse the issuance of the warrant of arrest. It is suggested that the Malaysian position may be similar to the English position as arrived at in *The Varna* insofar as Order 70 rules 4(1), (2) and (10) of the Rules of Court refer to issue of a warrant of arrest as opposed to application for a warrant of arrest. The point, however, awaits clarification from the courts of Malaysia.

[25] I felt that the time has come for this clarification and I invited the plaintiff and defendant's counsels to submit further on this point.

[26] The defendant submitted that there is a requirement of full and frank disclosure on the plaintiff when requesting for the issuance of the warrant of arrest, relying on para. [70.4.12] of the *Lexis Nexis Malaysian Court Practice* at p. 1462. The author's view is that the plaintiff has the duty to make full and frank disclosure of all material facts to enable the court to properly exercise its discretion and the English position is not applicable in Malaysia as the Malaysian O. 70 r. 4 does not contain the same language as the English RSC O. 75 r. 5. The text that the defendant relied on is reproduced below:

> [70.4.12] Full and frank disclosure of all material facts
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> *Being an ex parte application, the affidavit ought to make full and frank disclosure of all material facts: The Hoe Lee* [1970] 1 MLJ 45, (1969-1971] SLR 286; *The Andira now renamed Vasso* [1984] QB 477 ... *Full and frank disclosure of material facts would put the court in a position to properly exercise its discretion:* see *The Damavand* [1993] 2 SLR 717, CA (Sing), where it was held that *facts might still be regarded as material even though they may not have the effect of leading to a different decision being made. It is the duty of a deponent to correct false or inaccurate statements in the affidavit promptly and frankly even if they have simply been made by mistake: Sin Hwa Enterprise Co Ltd 21 Owners of Motor Ship Harima* [1987] HKLR 770, CA (HK); *The Dong Nai* [1996] 4 MLJ 454.
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> In the *Varna* [1993] 2 Lyold's Rep 253, the English Court of Appeal held that a plaintiff is entitled to the warrant of arrest, even if there has not been full and frank disclosure *(note that this case may not be applicable in Malaysia as r. 4 does not contain the same language as the English RSC O. 75 r. 5(1) ...*
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> ... In *Shivnath Rai Harnarain (India) Ltd v. The Owners of the Ship or Vessel* MV *'Win Moony' (LR 8204846) of the Port of Valetta, Malta* [2005] 1 MLJ 141, it was held that *the power to issue a warrant of arrest is 'discretionary and the discretion being a principled discretion must be exercised judicially having regard to all established judicial principles, after taking info account all relevant facts and circumstances, more so in ex parte applications which are applications uberrimae fidei (of utmost good faith) requiring full and frank disclosure of all material facts'* (per Low Hop Bing J (as he then was) at 158)
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> (emphasis added)

[27] The defendant further submitted that the Malaysian courts have consistently held that the court's power to issue a warrant of arrest is discretionary and it is incumbent to make the full and frank disclosure of material facts failing which the warrant of arrest should be set aside. The defendant relied on the High Court cases of *Thaumas Marine Ltd v. Owners And/Or Other Persons Having Interest In The Ship/Vessel "JHW Sapphire" (Official No: 334161/IMO No: 9541083) Registered In Port Klang, Malaysia* [2017] 1 LNS 2061; [2017] MLJU 2102, *Probase Offshore (M) Sdn Bhd v. Pemunya Kapal Dan Sesiapa Berkenaan Dengan Kapal atau Vessel "Permata Arau 1"* [2017] 1 LNS 1857; [2017] MLJU 1848, *Shivnath Rai Harnarain (India) Ltd v. The Owners of the Ship or Vessel MV 'Win Moony'* [2004] 1 LNS 444; [2005] 1 MLJ 141. For the general proposition that a party seeking an order based on an *ex parte* application must make full and frank disclosure of material facts to the court the defendant earlier relied on the case of *Castle Inn Sdn Bhd v. Bumiputra-Commerce Bank Bhd* [2009] 2 CLJ 445; [2009] 1 MLJ 542.

[28] The plaintiff submitted that the previous English law, pre-1986, as typified by the court in *The Vasso* [1984] 1 Lloyds Report 235 which calls for full and frank disclosure prior to the issue of the warrant is no longer good law. In 1986, O. 75 r. 5(1) of the RSC was amended. Whereas the previous rule stated that the plaintiff may apply for a warrant of arrest, the new rule states as follows:

> in an action *in rem* the plaintiff ... may after the issue of a Writ in the action ... issue a warrant ... for the arrest of the property against which the action is brought.

[29] It was further submitted by the plaintiff that para. 6 of O. 75 r. 5 of the RSC contains identical wording to the Malaysian ROC O. 75 r. 4(11) which supports the interpretation that the issuance of the warrant of arrest is as of right in all other circumstances except that provided under O. 75 r. 4(11). As the Malaysian O. 70 r. 4(1) contains substantially the same provision as the post-1986 English O. 75 r. 5 that the plaintiff may as of right have a warrant of arrest issued so long as the requirements of the rule is met. Given that a warrant of arrest can be issued as of right, the duty of full and frank disclosure pre-1986 was no longer applicable as stated in *The Varna* (*supra*).

[30] The plaintiff also submitted that the arresting party only has to demonstrate that he has complied with and satisfied the requirements under O. 70 r. 4(6) and (7) of the ROC and the plaintiff has done so without any duty of full and frank disclosure.

Analysis And Findings Of The Court

[31] I found favour with the plaintiff's submissions and held that the plaintiff has satisfied the court that the requirements under O. 70 r. 4(6) and (7) of the ROC were complied with, without any further requirement of full and frank disclosure in its request for the issuance of the warrant of arrest and as such, encl. 21 is dismissed. My grounds for arriving at my conclusion are as below.

[32] The position regarding the requirements in respect of O. 70 r. 4 ROC is the same as in England whereby the issue of a warrant of arrest is not a discretionary remedy, but a right for the plaintiff. There is no requirement of full and frank disclosure and the arresting party only has to demonstrate that he has complied with O. 70 r. 4 ROC. See para. [70/4/7] Sweet & Maxwell, *Malaysian Civil Procedure* (vol. 1) (Malaysia edn, 2018) at p. 936. The view stated in Sweet & Maxwell, *Malaysian Civil Procedure* is preferred over that in Lexis Nexis *Malaysian Court Practice* in view of the preponderance of authorities as I will discuss below.

[33] The case of *Castle Inn Sdn Bhd v. Bumiputra-Commerce Bank Bhd* (*supra*) relied on by the defendant for the general proposition that a party seeking an order based on an *ex parte* application must make full and frank disclosure of material facts to the court is not applicable in a request for the issuance of a warrant of arrest where specific and different requirements apply.

[34] The cases of *The MV 'Win Moony'* (*supra*) and *The Dong Nai* (*supra*) referred to by the defendant for the proposition that full and frank disclosure of all material facts is a requirement when applying for a warrant of arrest are no longer applicable after the ROC came into effect in 2012. Under O. 70 r. 4(2) of the Rules of the High Court 1980 ("RHC") a party must apply for a warrant of arrest but under O. 70 r. 4(2) of the ROC a party only needs to request for the issue of the warrant. Order 70 r. 4(2) of the ROC contains similar language to the (now revoked) English Rules of O. 75 r. 5 of the RSC which was amended in 1986.

[35] The crucial paragraphs of O. 70 r. 4 of the RHC, O. 70 r. 4 ROC and the (now revoked) O. 75 r. 5 of the RSC which govern the issuance of a warrant of arrest are reproduced below where the differences and similarity are clear to see.

[36] Order 70 r. 4 of the RHC:

> (1) After a writ has been issued in an action *in rem* a warrant in Form 156 for the arrest of the property against which the action or any counterclaim in the action is brought may, subject to the provisions of this rule, be issued at the instance of the plaintiff or of the defendant, as the case may be.

A (2) **A party applying for the issue** out of the Registry of warrant to arrest any property shall procure a search to be made in the caveat book for the purpose of ascertaining whether there is a caveat against arrest in force with respect to that property.

(3) **A warrant of arrest shall not be issued until the party applying** for
B it has filed a *praecipe* in Form 157 requesting issue of the warrant together with an affidavit made by him or his agent containing the particulars required by paragraphs (6), (7) or (8) so, however, that the Court may, if it thinks fit, allow the warrant to issue notwithstanding that the affidavit does not contain all those particulars. (emphasis added)

C **[37]** Order 70 r. 4 of the ROC:

(1) In an action *in rem* the plaintiff or defendant, as the case may be, may after the issue of the writ in the action and **subject to the provisions of this rule,** issue a warrant in Form 147 for the arrest of the property against which the action or any counterclaim in the
D action is brought.

(2) **Before a warrant to arrest any property is issued, the party intending to issue** it shall procure a search to be made in the caveat book for the purpose of ascertaining whether there is a caveat against arrest in force with respect to that property.

E (3) **A warrant of arrest shall not be issued until the party intending to issue the same** has filed a *praecipe* in Form 148 **requesting issue of the warrant** together with an affidavit made by him or his agent containing the particulars required by paragraphs (6), (7) and (8); however, the Court may, if it thinks fit, give leave to issue the
F warrant notwithstanding that the affidavit does not contain all those particulars.

...

(11) A warrant of arrest may not be **issued as of right** in the case of property whose beneficial ownership has, since the issue of the writ,
G changed as a result of a sale or disposal by any Court exercising Admiralty jurisdiction. (emphasis added)

[38] The (now revoked) O. 75 r. 5 of the RSC:

(1) In an action *in rem* the plaintiff or defendant, as the case may be, may after the issue of the writ in the action and **subject to the**
H **provisions of this rule** issue a warrant in Form No. 3 in Appendix B for the arrest of the property against which the action or any counterclaim in the action is brought.

(2) Where an action *in rem* is proceeding in a district registry, a warrant of arrest in the action may be issued out of that registry but, except
I as a warrant of arrest shall not be issued out of a district registry.

(3) Before a warrant to arrest any property is issued **the party intending to issue it** must procure a search to be made in the caveat book for the purpose of ascertaining whether there is a caveat against arrest in force with respect to that property, and if the warrant is to issue out of a district registry the registrar of that registry shall procure a search to be made in the said book for that purpose.

...

(6) A warrant of arrest may not be **issued as of right** in the case of property whose beneficial ownership has, since the issue of the writ, changed as a result of the sale or disposal by any court exercising Admiralty jurisdiction. (emphasis added)

[39] *The Varna* (*supra*) was decided in light of the amended O. 75 r. 5 of the RSC which bears similarity to O. 70 r. 4 of the ROC. A critical finding of the Court of Appeal was that based on the newly inserted para. 6 of O. 75 r. 5 RSC which stated that an arrest warrant cannot be issued as of right under the circumstances provided in para. 6, in all other circumstances the warrant is issued as of right. Scott LJ has this to say:

> the reference in para (6) to the circumstances in which a warrant "may not be issued as of right" suggested that in other cases, **the issuance of a warrant was intended to be "as of right" provided that the other provisions of rule 5 had been complied with** and the new para. 8 was consistent with the other steps taken by a plaintiff as a matter of right in relation to the issuance of a warrant. (emphasis added)

[40] The English position on O. 75 r. 5 is summarised by Nigel Meeson in his book *Admiralty Jurisdiction and Practice* (1993 edn), p. 121 where the learned author states:

> **However, the duty of disclosure in relation to an application for arrest is not as extensive as it is in relation to an application for a *Mareva* injunction or *Anton Piller Order*.** This is because where a plaintiff has a right to pursue a claim in the Admiralty Court by proceedings *in rem*, except in wholly exceptional circumstances he also has a right to obtain security for that claim by invoking the arrest procedure; the Court does not have to consider such matters as the balance of convenience. Thus although in form discretionary, **in practice arrest is granted as of right where the provisions of Order 75 r. 5 have been followed** ...
>
> (emphasis added)

[41] I respectfully decline to follow the more recent High Court case of the *JHW Sapphire* (*supra*) cited by the defendant as the authority that full and frank disclosure is required in an affidavit leading to the warrant of arrest as this decision was reversed by the Court of Appeal in Civil Appeal No. W-02(IM0)(ADM)-1327-07-2017. As for *The Permata Arau 1* (*supra*), the High Court referred to decision in *The MV 'Win Moony'* in arriving at the

A conclusion that the warrant of arrest is dismissed for non-disclosure of material facts. *The MV 'Win Moony'* was decided pre-2012 before the ROC was in effect.

[42] For good measure, the Singapore O. 70 r. 4 is reproduced below:

B (1) In action *in rem* the plaintiff or defendant, as the case may be, may after the issue of the writ in the action and subject to the provisions of this Rule, **apply for a warrant in Form 160 for the arrest** of the property against which the action or any counterclaim in the action is brought.

C (2) Before a warrant to arrest any property is issued, **a party applying for it** must:

(a) file a warrant in Form 160; and

(b) procure a search to be made in the record of caveats for the purpose of ascertaining whether there is a caveat against arrest in force with respect to that property.

D (3) A warrant of arrest shall not be issued until the **party applying for the warrant** has filed an affidavit made by him or his agent containing the particulars required by paragraphs (6) and (7); however, **the Court may, if it thinks fit, allow the warrant to issue notwithstanding that the affidavit does not contain all those particulars** (emphasis added)

E

[43] Given that the issue of the warrant in Singapore is not as of right as it is under the Malaysian O. 70 r. 4(1), the warrant of arrest remains a discretionary remedy and when seeking to establish the Singapore court's admiralty jurisdiction, the arresting party would have to "apply" for the warrant and that application has a duty of full and frank disclosure where the arresting party would be required to disclose all material facts supporting its claim. As such the cases of *Vasiliy Golovnin* [2008] 4 SLR(R) 994 and *The "Eagle Prestige"* [2010] 3 SLR 294 which imposed a full and frank disclosure requirement are inapplicable in Malaysia as this is based on a different set of rules.

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[44] The arrest affidavit which founded the arrest fulfilled the requirements of O. 70 r. 4(6) and (7) of the ROC and the plaintiff is entitled to issue the warrant as of right. In *The Varna*, it was held that if the affidavit complied with the requirements of para. 9 of O. 75 r. 5 RSC (equivalent to O. 75 r. 4(6) and (7) ROC), there was no further scope for a material non-disclosure attack on the arrest warrant. Here, the requirements were fulfilled when:

H

(i) The name, address and occupation of the applicant for the warrant were stated in para. 1 of the arrest affidavit pursuant to O. 70 r. 4(6)(a);

I (ii) The nature of the claim of which the warrant is required and that it has not been satisfied was stated in para. 5 of the arrest affidavit pursuant to O. 70 r. 4(6)(b);

(iii) The nature of the property, which is a ship, the name of the ship and the port to which she belongs was stated in para. 24 of the arrest affidavit pursuant to O. 70 r. 4(6)(c);

(iv) The amount of security sought was stated in para. 28 of the arrest affidavit pursuant to O. 70 r. 4(6)(d);

(v) Whether the ship against which the action is brought is the ship in connection with which the claim in the action arose was stated in para. 24 of the arrest affidavit pursuant to O. 70 r. 4(7)(a);

(vi) The belief of the deponent the person who would be liable on the claim in an action *in personam* was, when the cause of action arose, the owner of the ship in connection with which the claim arose and was also, at the time of the issue of the writ, the beneficial owner of all the shares in the ship against which the action is brought was stated in paras. 25 and 27 of the arrest affidavit pursuant to O. 70 r. 4(7)(b); and

(vii) The grounds of the deponent's belief were stated in para. 26 of the arrest affidavit pursuant to O. 70 r. 4(7)(c).

[45] Even if I am wrong on the requirement of full and frank disclosure as I have held above, I find that in any event, there is no non-disclosure of material facts in the plaintiff's arrest affidavit to justify the setting aside of the warrant of arrest.

[46] From the plaintiff's averments and the documents in the arrest affidavit and the plaintiff's affidavit in reply, I find that it was reasonable for the deponent to have stated in para. 19 of the arrest affidavit, "On 17 January 2020, both shippers named in the bills of lading ie, PT Agro Indomas and PT Agro Asia Pacific issued their respective letters of protest to the defendant's agent ie, Gama Bistari to inform that the cargo has been contaminated by seawater and the shippers hold Gama Bistari/the vessel fully responsible for the damages arising from the contamination of the cargo." The plaintiff did not mislead the court. This is based on the following:

(i) From the arrest affidavit, the first instance that the plaintiff noticed signs of contamination was on 13 January 2020 when upon opening hatch cover number two of the vessel for commencement of cargo discharge operation, it was discovered that the top surface of the cargo in hatch number two appears white where the cargo is believed to be mouldy. Samples were taken from the cargo during the inspection by the plaintiff's surveyor, Intertek.

(ii) The plaintiff then sent letters of protest to the sellers (PT Agro Asia Pacific and PT Agro Indomas) at pp. 70 and 71 of encl. 7 wherein it was stated, "Vessel has arrived at discharge port on 13 January 2020, and on inspecting the cargo by receivers surveyor, it is found that cargo is contaminated by seawater, for which by law we hold you fully responsible and liable for the damages caused due to this."

(iii) Intertek then conducted inspection on the cargo and in its report dated 20 January 2020 (which the defendant describes as only a "screenshot") at p. 69(a) of encl. 7 the result of the analysis was stated as:

Test	Method	Specification	Results	
			SURFACE SAMPLE	BELOW SURFACE SAMPLE
Chloride	In-house	Traces of Chloride	Positive High	Positive Traces

(iv) Although the defendant contended that chloride can mean anything, it was never contradicted by the defendant that chloride is a component of salt which is contained in seawater. Only at trial can it be determined for certain whether the cargo was indeed contaminated by seawater.

(v) The photos of the cargo (pp. 69(b) to 69(j) of encl. 7) taken during the inspection exhibited in the arrest affidavit also shows clearly the white appearance of the cargo.

(vi) Subsequent testing by Intertek as shown in the certificate of analysis dated 22 January 2020 at p. 60 of encl. 26 shows positive high contamination of seawater in the surface sample and positive traces in the below surface sample which confirms the plaintiff's observation when the hatch was opened.

(vii) Even Maphilindo, the defendant's appointed surveyor confirmed in its preliminary report dated 22 January 2020 at pp. 56 to 72 of encl. 20 (particularly at p. 59) that at the material time of discharge, the top surface of palm kernel seed (the cargo) was noted caking and mouldy to varying degrees.

(viii) I am satisfied that the averment of the plaintiff in the arrest affidavit that Sucofindo was the appointed surveyor for the defendant's agent, Gama Bistari was unintentional. The plaintiff had already satisfied the requirements of O. 70 r. 4(6) and (7) of the ROC. There was no added advantage in the plaintiff's representation. The contents of the documents issued by Sucofindo that the cargo deteriorated whilst in the custody of the defendant during the time of shipment as compared to the state of the cargo at the time of delivery was relevant and it did not matter who appointed Sucofindo.

(ix) The cargo was not "off-specification" at load port although the moisture and impurities contents of the cargo as indicated in the certificates of analysis exceeded the specification provided in the sales contracts as these were within the allowance given for cargo moisture content and impurities content.

(x) The bills of lading state "Shipped on board in apparent good order and condition, weight, measure, marks and numbers, quality, contents and value unknown for carriage to the port of discharge". No notation nor any clausing is apparent on the bills of lading. If the cargo was mouldy, there would be a notation on the bills of lading to that effect. The statement by the Master is an admission that the cargo was received by the vessel in good order and condition. See *Silver v. Ocean Steamship Company, Limited* [1928. S. 871.] [1930] 1 KB 416.

[47] Finally, as for whether the writ should be set aside, the defendant failed to establish that the claim of the plaintiff is either legally or factually unsustainable. See *The Bunga Melati 5* [2012] 4 SLR 546.

Conclusion

[48] Considering the totality of the facts and circumstances of the case as disclosed in the affidavit evidence, it was quite clear to me that the contentions of the defendants do not merit the setting aside of the writ and warrant of arrest. Accordingly, in view of the foregoing reasons, I have no doubt that the warrant of arrest was properly issued and the plaintiff's claim is not legally or factually unsustainable to justify the dismissal of encl. 21.